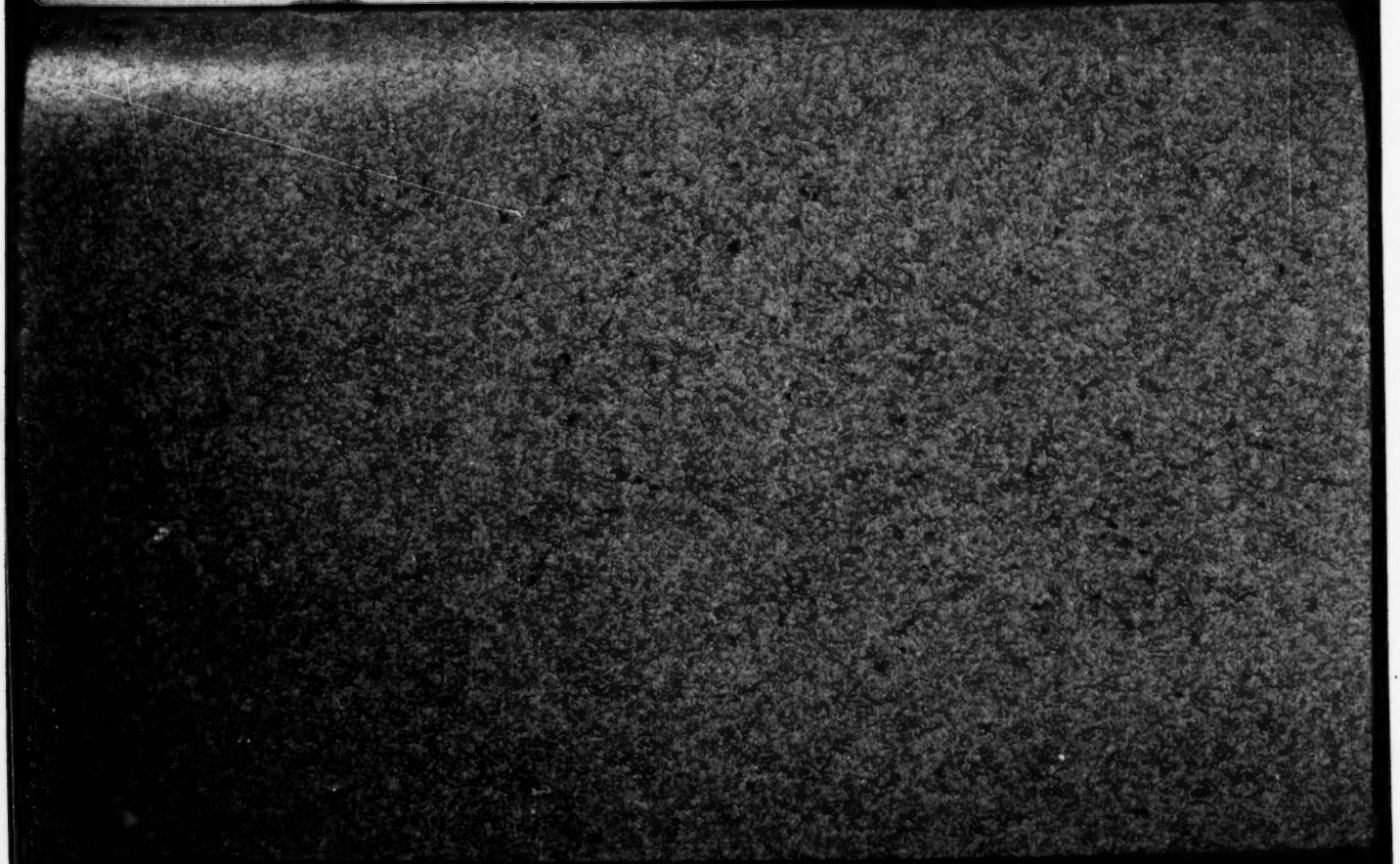

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 94.

LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

Upon a Writ of Error to the Court of Appeals of the District of Columbia.

Brief in Behalf of the Plaintiff in Error.

Statement.

This was a prosecution commenced in the Police Court of the District of Columbia charging the plaintiff in error with a misdemeanor in violating the provisions of an act of Congress against "the emission of dense or thick black or gray smoke or cinders," under certain circumstances. The act defining the law was passed on the 2d day of February, 1899, and is found in the 30th Statutes at Large, at page 812, and is in the following language:

> "Be it enacted, etc., That on and after six months from the passage of this act the emission of dense or thick black or gray smoke or cinders from any smoke-stack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia shall be deemed, and is hereby declared, to be a public nuisance:
>
> "Provided, That nothing in this act shall be con-

strued as applied to chimneys of buildings used exclusively for private residences.

"SEC. 2. That the owner, agent, or lessee, or occupant of any building of any description, from the smokestack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named shall be deemed and held guilty of creating a public nuisance and of violating the provisions of this act.

"SEC. 3. That any person or persons violating the provisions of this act shall, upon conviction thereof before the Police Court of the District of Columbia, be punished by a fine of not less than ten dollars nor more than one hundred dollars for each and every offense; and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense.

"SEC. 4. That in order to provide for the enforcement of the provisions of this act there shall be detailed from time to time by the Commissioners of the District of Columbia an inspector or inspectors of the health department of the District of Columbia, whose duty it shall be, under the supervision of the health officer of the District of Columbia, to cause to be prosecuted all persons violating the provisions of this act.

"SEC. 5. That no discrimination shall be made against any method or device which may be used for the prevention of smoke and which accomplishes the purpose of this act.

"SEC. 6. That all acts or parts of acts inconsistent herewith be, and the same are, hereby repealed."

The information charged the plaintiff in error with being the occupant of the building situated at No. 213 Fourteenth street northwest, to which there was alleged to be attached a smokestack and chimney, and with permitting the emission from said smokestack and chimney of thick or dense black and gray smoke on a day certain stated in said information (Rec. p. 1). To this information the defendant entered a plea

"not guilty," and a jury trial was had resulting in a verdict of "guilty," and sentence to pay a fine of $50, or in default to be committed to the workhouse for a term of ninety days (Rec. p. 3).

At the trial certain exceptions were taken to the rulings of the court.

The evidence on behalf of the District tended to prove that on the 11th day of February, 1902, smoke of the character mentioned in the act was emitted from the smokestack in question for the space of 15 minutes between 10 o'clock and 48 minutes in the morning and 1 o'clock and 20 minutes in the afternoon, as follows: From 10.48 to 10.52; from 11.10 to 11.12; from 11.26 to 11.30 a. m., and from 1.15 to 1.20 p. m., and that the smoke came from a chimney which is attached to thirteen furnaces and boilers and eight stationary engines in the plant of the United States Electric Lighting Company; that the defendant had an office in the building No. 213 Fourteenth street northwest, mentioned in the information, and that over the door of his office was the sign "Office of the General Superintendent;" that the plaintiff in error was the general superintendent of the said United States Electric Lighting Company, and occupied the office over which the sign was placed; that one Henry S. Bolton was the engineer in charge of the electric lighting company's plant, who employed the men who attended to the furnaces, and had charge of them and the furnaces and engines; and that the plaintiff in error was his superior officer. And thereupon the witness Bolton, called as a witness by the District, was asked to whom he made reports, to which question counsel for the plaintiff in error objected on the ground that the reports were in writing and should be produced, but the court overruled the objection, to which the plaintiff in error excepted (Rec. p. 6). And the witness thereupon testified that he made reports, both written and verbal, to the plaintiff in error. He further testified that said Sinclair took no active part in the running or the con-

trol of the plant; that he received orders from Sinclair from time to time, but could not tell in relation to what particular matter; that Sinclair made the contract of employment with him but he was paid by the company; that witness did not know who purchased the coal. Witness was then asked what kind of coal was used at the plant, and answered that bituminous coal was used. It also appeared from the testimony of the witness Bolton that the smokestack is not upon or connected with the building No. 213 Fourteenth street, but upon the adjoining premises known as the United States Electric Lighting Company's plant, and that there is an alley between that building and the plant; that supplies for the power plant are taken in through the alley, which is about eighteen feet wide; that he did not remember to have received any order from plaintiff in error in any manner concerning the fires or running of the furnaces, boilers, or engines; that the power station fronts about one hundred and twenty feet on Fourteenth street and two hundred and twenty feet on B street, and that it does not include No. 213 Fourteenth street northwest; that the machinery and smokestack are in the building on the last-mentioned place and not in 213 Fourteenth street northwest; that there is a wall at the rear of premises No. 213 Fourteenth street that runs across the alley and connects with the wall of the building containing the machinery; and that the plaintiff in error had no office or desk in the building that contains the machinery. The evidence on behalf of the plaintiff in error tended to show that he was not elected by the stockholders or directors, but was appointed by one of the general officers of the electric lighting company, either the treasurer or vice-president, and the manner of his appointment was the same as that of linemen, motormen, and other employees of the company; that the power plant containing the machinery and smokestack was in a building entirely separate from No. 213 Fourteenth street; that there are no numbers on the build-

ings containing the machinery and smokestack; that 217, 219, and 221 Fourteenth street are used as storehouses by the United States Electric Lighting Company and the Potomac Electric Power Company; that the officers of the United States Electric Lighting Company are a president, vice-president, treasurer, secretary, and general manager, and that the plaintiff in error did not hold any of those offices.

Thereupon the plaintiff in error introduced as witness John T. Sullivan, who testified that he was a steam engineer by occupation, and that he had had ten years' experience in operating furnaces and plants for the production of electricity, either for lighting or for motive power; whereupon counsel for plaintiff in error put the following question to the witness:

> "What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke?"

To this question counsel for the prosecution objected; whereupon counsel for the defendant stated:

> "The point I propose is this: This company, under the express or implied license of Congress, or both, has expended a very large amount of money in establishing a plant here in the District of Columbia. It is charged with great public duties. The lighting of the streets of the city is a part of its duty, in addition to the illumination of public and private residences and business houses. It is under a legal obligation to perform this work. It would be liable in damages if it refused. The point that I wish to make is that any act, especially an act passed after a company has been authorized and directed to expend large sums of money in installing costly and important public improvements, which deprives it of the power of using its property, an act which disables it from performing a public duty for the neglect of which or the failure to perform which it

would be liable in damages, would be an unconstitutional act; and if we can prove to the satisfaction of the jury that the emission of such smoke, under such circumstances, as is shown in this case, is absolutely indispensable to the company's enjoyment of its property, and to the performance of its public duties, which it is obliged to perform, then to that extent the act would be unconstitutional. We offer this testimony in that connection, and we offer to prove the facts to which we refer."

But the court sustained the objection and excluded the testimony, to which ruling counsel for the plaintiff in error excepted (Rec. pp. 11 and 12).

After the close of the evidence, counsel for the plaintiff in error requested the court to instruct the jury to return a verdict for the defendant, and also that there was no evidence from which the jury could find that he was an occupant of the premises mentioned in the information; that the jury should acquit unless they believed from the evidence that he was an occupant of the building from the smoke-stack of which the smoke was emitted; that they must acquit unless they find he participated in or controlled the use of the furnaces, boilers, or stationary engines; that the jury would not be justified in finding that the plaintiff in error was an occupant of the said premises merely upon the fact that he was known as general superintendent of the Electric Lighting Company, or the superior officer of the witness Bolton, without evidence to show his participation in or control over the furnaces, etc.; but the court refused to give any of the said instructions, and the counsel for the plaintiff in error excepted to such ruling severally. The court, at the request of the counsel for the prosecution, instructed the jury that the emission of smoke as described in the information was a public nuisance; that if they found the plaintiff in error had an agency or control of the furnaces at the premises mentioned in the information, he was an occupant of the building; that if he was the superin-

tendent of the owner and had control of the furnaces, or engineer, or other persons who operated the same, then he was an occupant; that if he was the superintendent of the building situated at Fourteenth and B streets northwest, in the city of Washington, District of Columbia, described in the information as 213 Fourteenth street northwest, and known as the plant of the United States Electric Lighting Company, then in contemplation of law he was the occupant of said building, the counsel for the plaintiff in error objecting and excepting to the granting to each of said instructions on behalf of the prosecution (Rec. pp. 12, 13, and 14). The jury, after retiring, having come in for further instruction, inquired of the court whether, if they should find that there was no smokestack attached to the building described in the information, their verdict should be not guilty. To this simple question the court's answer, at first, was simply the reading of the third and fourth instructions, granted on behalf of the District, which instructions, as will be noticed, endeavored to blend together the premises "mentioned in the *information and evidence*" (Rec. pp. 14 and 15). This was followed by a suggestion, in effect, from the court, that the gate which formed a part of the fence between the buildings might be treated as connecting them. Thereupon, the jury asking for something more specific, the court, under the objection of the plaintiff in error and subject to his exception, told them that in New York and other places—

> "the power is created by a stationary engine, steam boiler and a furnace, the smoke passing through a smokestack, which need not be within half a mile of where the power is applied—that the power was distributed over the city, and that the smokestack might not be connected with or be anywhere near where the power is applied, and I think that is an illustration you may use."

Thereupon, the District not being satisfied, even with this, the court instructed the jury, subject to exception by the

plaintiff in error, that, if they should find there was no smokestack attached to the building No. 213 Fourteenth street northwest, the only premises of which the plaintiff in error was charged in the information with being an occupant, or from which he was charged with causing smoke to issue, still they could not acquit.

After a verdict of "guilty," and judgment, plaintiff in error obtained a writ of error to the Court of Appeals of the District, which last-mentioned court affirmed the judgment of the Police Court (see Rec. pp. 17 and 19 for opinion and judgment of the court).

Thereupon the plaintiff in error sued out a writ of error from this court to the Court of Appeals.

Assignment of Errors.

The court below erred in sustaining the Police Court in the following particulars:

1. In holding that the act for the prevention of smoke in the District of Columbia, and for other purposes, approved February 2, 1893, was constitutional.

2. In refusing to instruct the jury upon the whole evidence to acquit the plaintiff in error.

3. In excluding the evidence on behalf of the plaintiff in error that such emissions of smoke as were shown in the evidence were indispensable to the use or enjoyment of the power plant, and that the prohibition thereof was a taking of said property.

4. In instructing the jury that the smoke mentioned in the information and shown by the evidence was a public nuisance.

5. In instructing the jury that they could find the plaintiff in error guilty, though they should find as a fact that smoke was not produced in or emitted from premises No. 213 Fourteenth street.

6. In informing the jury that, in New York and elsewhere, power is created by engines, boilers, or furnaces, the

smoke of which passes through a smokestack, which need not be within half a mile from where the power is applied, or connected with or anywhere near such place, and that this was an illustration which they might use in passing upon the guilt or innocence of the plaintiff in error.

Jurisdiction.

Counsel for plaintiff in error have been verbally notified by counsel for the defendant in error that a motion to dismiss will be submitted with their argument on the merits on the ground that the court has no jurisdiction in this case.

The court has jurisdiction upon the ground that the validity of a statute or an authority exercised under the United States is drawn in question. The jurisdiction of this court over cases adjudicated in the Court of Appeals of the District of Columbia is regulated by section 233 of the Code of the District, which is as follows:

> "SEC. 233. Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

This is the same language as that contained in section 8 of the organic act of the Court of Appeals passed February 9, 1893 (27 Stats. at Large, at page 434), and the same law was in force prior to that time regulating appeals from the Supreme Court of the District of Columbia to this court.

This court has determined that it has jurisdiction in all cases where the validity of such statutes or authority is drawn in question.

> Parsons *vs.* District of Columbia, 170 U. S. 45.
> Capital Traction Co. *vs.* Hof, 174 U. S. 1.

One of the questions in the Parsons case was whether the Commissioners of the District of Columbia had power and authority to assess upon abutting property the expenses of laying water mains. The proceeding in the Supreme Court of the District of Columbia was by *certiorari* to remove the proceedings of the Commissioners making such an assessment into that court and have the same quashed. The fifth ground assigned in Parsons' petition for quashing the same was:

> "5. The assessment was made without authority of law, and the respondents had no jurisdiction or right to make the same" (see 170 U. S., p. 46).

The questions at issue in that case were stated in the opinion of this court (see 170 U. S., p. 50) as follows:

> "It is stated in the opinion of the Court of Appeals that the questions raised in that court were three: 1st. Whether the act of the legislative assembly of the District of Columbia, approved June 23, 1873, in reference to the construction of water mains, and providing the mode of assessment therefor, and also the act of Congress of August 11, 1894, 'to regulate water-main assessments in the District of Columbia' are constitutional and valid enactments; 2d. Whether in the assessment there was a sufficient description of the appellant's property; 3d. Whether there was sufficient notice of the assessment given to the appellant. Those questions are clearly within terms of the statute authorizing this court to review the final judgments or decrees of the Court of Appeals."

In Hof *vs.* Capital Traction Co., this court said:

> "The petition for a writ of certiorari presents for determination a serious and important question of

> the validity, as well as the interpretation and effect of the legislation of Congress conferring upon justices of the peace in the District of Columbia jurisdiction in civil actions in which the matter in dispute exceeds twenty dollars in value, and providing for a trial by a jury before the justice of the peace, an appeal from his judgment to the Supreme Court of the District of Columbia, and a trial by a jury at the request of either party, in the appellate court. This court, therefore, has jurisdiction of the writ of error. Baltimore and Potomac Railroad *vs.* Hopkins, 130 U. S. 210, 224; Parsons *vs.* District of Columbia, 170 U. S. 45."

In the present case "the validity as well as the interpretation and effect of the legislation of Congress" is involved, as it was in the Hof and Parsons cases. This case is unlike the cases of the B & P. R. R. Co. *vs.* Hopkins, 130 U. S. 210; District of Columbia *vs.* Gannon, 130 U. S. 227; United States *vs.* Lynch, 137 U. S. 280; South Carolina *vs.* Seymour, 153 U. S. 353, and other like cases where jurisdiction was denied because the questions involved only the construction, and not the validity of the statutes or powers.

The question of the constitutionality of the law was made in the Police Court, both by asking an instruction for a verdict for the plaintiff in error, and by assigning it as one of the grounds of the motion for a new trial (see Rec. pp. 4 and 13). The assignment of the unconstitutionality of the law as one of the grounds in support of the motion for a new trial is in itself a sufficient making of that question in the record to give this court jurisdiction, as was held in the case of the St. Louis Coal Company *vs.* Illinois, 185 U. S. 203, where the question was made for the first time upon motion in arrest of judgment. The court in that case on pages 206–7 of the report said:

> "While the constitutionality of the law was not specially set up and claimed before the trial in the Circuit Court, there was a motion made in arrest of

> judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the Fourteenth Amendment to the Constitution. The motion was denied, although the Supreme Court did not in terms pass upon the Federal constitutionality of the law. But this was a sufficient presentation of the Federal question."

The court below said nothing in its opinion in this case about the constitutionality of the law, for the reason that it had fully considered and determined that question in the two previous cases of Moses *vs.* The United States, 16th App. Cases D. C. 428, and Bradley *vs.* the District of Columbia, 20th App. Cases D. C. 169.

The Act of Congress is Unconstitutional.

The act of Congress under consideration in this case is invalid, because its enforcement has the effect of taking private property for public use without just compensation, and of depriving persons of their liberty and property without due process of law, and denies to them the equal protection of the law.

The first section declares—

> "*the emission of dense or thick, black or gray smoke or cinders from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia,*"

to be a public nuisance, but expressly excepts from the operation of the act buildings used exclusively for private residences, and by implication also excepts from its operation locomotive engines and steamboats. Whether the smoke is a public nuisance is not made to depend at all upon the locality of the smokestack, or the proximity thereto of other buildings or residences. The emission of smoke at some isolated place within the city limits, or in the country miles away from any residences, is declared to be a public nuisance

equally with the smoke produced in thickly-populated localities. If the smoke be produced by a stationary engine, steam boiler, or furnace, situated in any building other than a private residence, it is declared to be a public nuisance, while if the same character and quantity of smoke, and for the same or greater periods of time, be produced from a private residence, it is not so declared. If the smoke be produced from a locomotive engine or a steamboat it is not a public nuisance. So that, under the act, the owner of steamboats and locomotive engines may produce the same kind, character, and quantity of smoke, in the same localities that the stationary engine does, and be innocent, while if the owner or occupier of a building having a stationary engine, steam boiler, or furnace produces it, he is guilty of an offense and liable to punishment.

It is also apparent that, under the operation of the act, two buildings might be standing side by side, one a private residence, the other an apartment house or office building, and the smokestack or chimney of each emitting the same kind and character of smoke, produced by the same kind or character of machinery or apparatus, and the owner of the one be guilty of an offense under the law, while the other would be innocent. Nor does the quantity or the length of time of the emission of the smoke affect the question. If it be emitted from a smokestack connected with a stationary engine, steam boiler, or furnace, for ever so short a time and in ever so small a quantity, it is declared to be a public nuisance and punishable.

It may be admitted that the regulation of the production of smoke in thickly-settled localities is within the police power, and Congress may legislate thereon for the District of Columbia so long as its enactments are reasonable, but the present act is an unequal, offensive, and unreasonable exercise of the police power. That the courts have the power in such cases to declare the statute invalid is well settled.

Mugler *vs.* Kansas, 123 U. S. 623.

Lawton *vs.* Steele, 152 U. S. 133.

In the case of Mugler *vs.* Kansas, this court said at page 661 of the report:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no *real or substantial* relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." . . .
>
> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In the case of Lawton *vs.* Steele the court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon the individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or interpose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts" (page 137). . . .

And the same doctrine has been repeated in many subsequent cases in this court.

The Fifth Amendment to the Constitution affords to the

citizens of the District of Columbia the same protection that the Fourteenth Amendment does to the citizens of the States against legislation of this character.

Callan *vs.* Wilson, 127 U. S. 540.
Brown *vs.* New Jersey, 175 U. S. 172.

And, besides, legislation in violation of the rights of liberty, property, and equality is unreasonable and void regardless of any express constitutional provision.

Loan Asso. *vs.* Topeka, 20 Wallace, 655.
Cooley's Constitutional Limitations, 3d ed. 391.
1st Dillon on Mun. Cor., 322.
Tiedman on Limitation on Police Power, pp. 197–198.

In Loan Association *vs.* Topeka, speaking upon this subject, this court said:

> "There are limitations of such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Judge Cooley says in his work, above referred to, on page 391:

> "But everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough' (Locke on Civil Gov't, 142). This is a maxim in constitutional law, and by it we

may test the authority and binding force of legislative enactments. . . .

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specific lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to 'their pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." . . .

The court below understands this to be the rule as shown by its opinion in the case of Moses *vs.* United States, in which it held this law constitutional. In that case the court said (16 Ap. D. C. 433):

"The power of Congress to enact regulations affecting the public peace, morals, safety, health, and comfort, within the District of Columbia, is the same as that of the several State legislatures within their respective territorial limits. It is no less nor can it be greater; for all of the guaranties of the Constitution respecting life, liberty, and property are equally for

the protection and benefit of all citizens residing in the District of Columbia, as those residing in the several States. Callan *vs.* Wilson, 127 U. S. 640; United States, ex rel. Kerr *vs.* Ross, 5 App. D. C. 241–247–248; Lansburgh *vs.* Dist. of Col., 11 App. D. C. 512, 521; Stoutenburgh *vs.* Frazier, ante p. 229."

Judge Dillon, in 1 Dill. Mun. Cor., sec. 322, above referred to, says:

"As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect can not be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed." . . .

"The by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination, if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tide water to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country." . . .

In Tiedeman on Limitations of Police Power it is said:

"We deny that the legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has a right by the the Constitution to prohibit or to confiscate, it may thus deal with, without first declaring the matter to be a nuisance; and whatever it has not a right by the Constitution to prohibit and confiscate, it can not thus deal with, even though it first declare it a nuisance. It is also a judicial question whether the police regulation extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to

impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to *dissipate the threatening evil*. The legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil." . . .

"And it is a judicial question whether a particular regulation is a reasonable exercise of police power. The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the legislature, but whether a given regulation is a reasonable restriction upon personal right is a judicial question."

In the case of Simrall *vs.* the City of Covington, 90 Ky. 444, it is said:

"Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right. It is a rule, therefore, that where the by-law of a municipality, enacted under a general grant of power or by virtue of its incidental authority, is unfair and partial in its operation, it will be declared void. It will not be upheld if it be unreasonable and oppressive. It must not contravene common right or the general law of the State, or make unwarranted or special discriminations." . . .

The act of Congress in question is not only void as being unreasonable and in restraint of the right to make reasonable use of property, but also as denying to the classes included in it the equal protection of the law, as is apparent from many decisions of this court.

Yick Wo *vs.* Hopkins, 118 U. S. 356.
Gulf, Colorado & S. F. Ry. *vs.* Ellis, 165 U. S. 150.
Lake Shore, etc., R. R. Co. *vs.* Smith, 173 U. S. 684.
Cotting *vs.* Kansas City Stock Yards Co., 183 U. S. 79.
Connolly *vs.* The Union Sewer Pipe Co., 184 U. S. 540.
Billings *vs.* Illinois, 188 U. S. 97.

In the case of Yick Wo *vs.* Hopkins, an ordinance of the city of San Francisco capable of being so administered as to discriminate against Chinese laundries was held to be invalid.

In the opinion of the court in that case, at page 369, it is said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." . . .

In the case of Gulf, Colorado and Santa Fe Railway *vs.* Ellis, the act of the legislature which provided for the recovery of an attorney's fee on behalf of the plaintiff in certain classes of actions against railroad companies was held to be invalid as discriminating legislation. In speaking of the right of the legislature to discriminate, and the limitation of such right, the court said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action" (p. 154). . . .
>
> "That (classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" (p. 155). . . .

Quoting from the case of State *vs.* Loomis, 115 Mo. 307–314, the court says:

> "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be incompetent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land" (p. 155).

This court continues, at page 160:

> "No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government." . . .

In Lake Shore, etc., R. R. Co. *vs.* Smith, the court held that an act of the legislature of Michigan requiring the railroad company to sell one thousand mile tickets, good for two years, at certain prices to any one who desired to purchase them, good for the purchaser or his family to use, was void as discriminating legislation.

In Cotting *vs.* Kansas City Stock Yards Company, the act regulated the charges to be made by such companies, but provided that it should apply only to companies doing a certain volume of business. The act was declared void as denying to the companies to which it applied the equal protection of the laws. The court said:

> "If the average daily receipts of a stock yard are more than one hundred head of cattle, or more than three hundred head of hogs, or more than three hundred head of sheep, it comes within the purview of this statute. If less than that amount, it is free from legislative restriction."
>
> "Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is the amount of business done by the two classes. . . .
>
> "In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does." . . . (104.)

Quoting from the opinion of the court in the case of State *vs.* Hann, 61 Kansas, 146, this court said:

> "Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. . . . A classification of the kind exempted makes a distinction between corporations identical in organization, capital, and all powers and priviliges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character." . . .

And again, on page 111, the court said:

> "But, while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing

> the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when, upon one of two parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the other."
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> . . . . . .
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> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In the case of Connolly *vs.* the Union Sewer Pipe Co., 184 U. S. 540, this court held the statute of Illinois void which made it a misdemeanor for persons or corporations to combine for the purpose of controlling prices or creating monopolies, but excepted from the operation of the act farmers and raisers of live stock. The opinion in this case examines many of the more important decisions of this court upon the question under consideration, and distinguishes between the legislative power of taxation and the police power, holding that the former is much more extensive than the latter.

In the course of the opinion it is said:

> "The State has undoubtedly the power, by appropriate legislation, to protect public morals, the public health and public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." . . . (p. 558.)

After referring to the cases and stating the principles to be deduced from them, the court continues:

> "These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides, notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.
>
> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'"

After referring to the cases upon this subject, involving the power of taxation, and speaking of the breadth of such power of the legislature, the opinion proceeds:

> "But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it can not divide those engaged in trade into two classes, and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same

domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

. . . . . .

"We conclude this part of the discussion by saying that, to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices, for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." . . .

The court also held in that case that, as it did not appear that the legislature would have enacted the law if it had supposed that an exemption was invalid, the whole statute was unconstitutional and void.

The later case of Billings *vs.* Illinois was an inheritance tax case, and the classification was held valid. This case serves to illustrate and emphasize the difference between the taxing power and the police power of the legislature. The rule upon the subject of classification was forcibly stated in that case, in the following language:

> "If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking it will be appropriate; legally speaking, a law based upon it will have equality of operation." . . .

The case of Connolly *vs.* the Union Sewer Pipe Company would seem to be so much like the present case in principle that it is impossible to differentiate them. Why should a person owning an office building be held guilty of an offense for doing the same thing that his near neighbor does who occupies his building as a residence and is held innocent? Or why should the plaintiff in error be held guilty of a misdemeanor when the owners of steamboats or locomotive engines which pass near him and create a greater volume of smoke and of a more offensive character are innocent of any offense?

In this connection, the assignment of error to the effect that the court erred in refusing to admit evidence tending to prove that it was impossible for the plaintiff in error to comply with the law without abandoning or losing the use of his property may be considered. The evidence was clearly admissible. If there be facts or circumstances of which the court can not take judicial knowledge, tending to show that a legislative act passed in pursuance of the police power is unreasonable, or that the enforcement of it will have the effect of depriving a party of his liberty or property, or will be unduly burdensome, they may be shown by competent evidence.

Chicago, Mil. & S. P. R. R. Co. *vs.* Minnesota 134 U. S. 418.
Smythe *vs.* Ames, 169 U. S. 466.
Commonwealth *vs.* Parks, 155 Mass. 531.
Rideout *vs.* Knox, 148 Mass. ~~372~~ 368
Health Dept. *vs.* Rector, 145 N. Y. 32.

In discussing the validity of an ordinance requiring owners of houses to furnish them with Croton water, Mr. Justice Peckham used the following language in the case of Health Department *vs.* Rector:

> "As to the other objection, no one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It can not be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property, and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be a reasonable, proper, and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges."
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> . . . . . .
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> "The difference between what is and what is not reasonable frequently constitutes the dividing line between a valid and void enactment by the legislature in the exercise of its police power. In commenting on the difference of degree in any given case which would render an act valid or otherwise, Mr. Justice Holmes, in Rideout *vs.* Knox, speaking for the Supreme Court of Massachusetts, said: 'It may be said that the difference is only one of degree;

most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain (148 Mass. 368, 372).'"

Decisions of State Courts in Smoke Cases.

Some of the State courts have dealt with this question, and there is some contrariety of opinion amongst them upon the question of the validity of enactments similar to the one under consideration, though none of the others contain such sweeping provisions and discriminations as this. The following cases are referred to:

St. Paul *vs.* Gilfillan, 36 Minn. 298.
St. Louis *vs.* Hertzberg Packing Co., 141 Mo. 375.
State *vs.* Mott, 61 Md. 297.
Harmon *vs.* Chicago, 110 Ill. 400.
People *vs.* Boden, 86 Mich. 273.
Cleveland *vs.* Mahm, 5 Ohio N. P. 203.
Cincinnati *vs.* Miller, 29 Cin. Law Bulletin, 364.
Health Dept. of N. Y. City *vs.* Ebling Brewing Co. (municipal court), 78 N. Y. Supp. 11.
Dept. of Health of N. Y. City *vs.* Ebling Brewing Co. (municipal court), id. 13.

Cleveland *vs.* Mahm, was a prosecution in the Police Court of Cleveland under the following ordinance:

"That the emission of dense smoke from any chimney anywhere in the city, or from the smoke-stack of any boat, locomotive, or stationary engine or boiler, within the limits of the city of Cleveland, shall be deemed and is hereby declared to be a public nuisance, and the owner, lessee, engineer, fireman,

employee, or other person having charge or control of, or operating any boat, locomotive or stationary engine, or boiler, manufactory, building or premises, within the corporate limits of said city, who shall cause or permit dense smoke to issue from any smokestack or chimney thereof, or connected therewith, shall be deemed guilty of creating a public nuisance and shall be fined for first offense not less than $10.00 nor more than $50.00 and for each subsequent offense not less than $25.00 nor more than $100.00."

Held void because indefinite, vague, and beyond the power of the city council as being a prohibition instead of a regulation.

In Cincinnati *vs.* Miller a similar ordinance was held valid.

In the two cases in the 78 N. Y. Supp. the same ordinance was under consideration. It is as follows:

"Sec. 134. That the owners, lessees, tenants, and managers of every blacksmith or other shop, forge, coal yard, foundry, manufactory, and premises where any business is done, or in or upon which an engine or boilers are used, shall cause all ashes, cinders, rubbish, dirt, and refuse to be removed to some proper place, so that the same shall not accumulate at any of the above-mentioned premises, or in the appurtenances thereof, nor the same become filthy or offensive. Nor shall any owner, lessee, tenant, manager, engineer, fireman, or any other person cause or allow any smoke, cinders, dust, gas, steam, or offensive odor to escape or be discharged from any such building, place, or premises, and every furnace employed in the working of engines by steam, or in any mill, factory, printing house, dye factory, iron foundry, glass house, distillery, brew house, sugar refinery, bake house, gas works, or in any other buildings used for the purposes of trade or manufacture, shall be so constructed as to consume or burn the smoke arising therefrom."

It is said in one of the opinions that, though enacted by the board of health, it had subsequently received legislative

sanction. The parties were the same in both cases. In the first, Joseph, J., held the ordinance valid and imposed a fine on the defendant. In the second, Tierney, J., expressed doubt as to its validity, but decided that the proper construction of the ordinance was that the production of the smoke must be "*to the* detriment or annoyance of any (some) person," and discharged the defendant because the evidence showed only the emission of smoke. Upon this point Judge Tierney said:

> "The defendant's counsel urges that this ordinance, literally interpreted, goes beyond the power of the legislature, and is therefore void. I have grave doubts whether this may not be so, and, until the board of health, under the power granted by the charter (section 1172) adopts an ordinance whose literal meaning can be reasonably upheld, whether acts that violate its spirit can be reached by the courts unless they constitute a public nuisance."
>
> . . .
>
> "Whatever my personal views may be of the validity of this ordinance, I should hesitate to pronounce it void, because, after having received the approval of the legislature, some higher court than this should first pass on that question, and because this very point of the illegality of this section was raised by this defendant in another proceeding and passed upon adversely to its claim by another justice of this court." . . .

The case of People *vs.* Boden, 86 Mich. 273, was a prosecution under a smoke ordinance in the following language:

Section 1:

> "The emission from any chimney or smokestack within the city, of dense smoke, or smoke containing soot or other substance in sufficient quantity to permit the deposit of soot or other substance on any surface within the corporate limits of the city, shall be deemed and is hereby declared a public nuisance."

Section 2:

> "Any owner, agent, lessee, or manager of any building, boat, locomotive, or other structure in the

> city of Detroit, who shall cause or permit dense smoke, or smoke containing soot or other substance as above, to be emitted from such structure, or from any other place, which said soot or other substance shall damage the property or injure the health of any person, or shall especially annoy the public, shall, upon the complaint of any citizen or officer of the city, in case of special annoyance, be liable for each and every such offense to a fine of not less than ten dollars nor more than one hundred dollars, or to imprisonment in the House of Correction not less than ten days nor more than thirty days, or both such fine and imprisonment, in the discretion of the court. *Provided*, that the provisions of this ordinance shall not apply to buildings used exclusively for private residence or to steamboats."

A conviction under this ordinance was sustained by a majority of the court. As to the contention that the ordinance was void because it exempted steamboats and private residences from its operation, the court said :

> "Ordinances must not only be reasonable and within the power of the municipality to enact them under its charter, but must affect each member of the community alike. They should neither favor nor discriminate against any person or class of persons or any particular portions of the municipal territory. Their burdens and their benefits should rest equally upon all. It can not be said that this ordinance makes such a discrimination that the court should declare it invalid." . . .

The above quotation is all that is said in the opinion of the court upon that subject. Two judges dissented upon the ground as stated by them that the ordinance was unreasonable and made an unjust discrimination which the law ought not to permit.

The cases of St. Paul *vs.* Gilfillan, St. Louis *vs.* Hertzberg Co., and the State *vs.* Mott are referred to by the court below in its opinion in the case of Moses *vs.* United States (16 App.

Cas. D. C. 433), when the question of the constitutionality of this statute was first before that court, and it is there said that those cases involved the construction of powers delegated by the legislatures to municipal officers, and that they have no application to the exercise of the power by the legislature itself. It is submitted that these cases can not be so easily disposed of, and that, while, in each of those cases, the courts had under consideration the validity of a municipal ordinance, the principal reasons given by the courts for holding them invalid apply as well to the legislature as to the municipal authorities.

In the case of City of St. Paul *vs.* Gilfillan, the court said:

> "An ordinance was adopted and passed by the city council of St. Paul, February 16, 1886, declaring the emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney, anywhere in the city, a public nuisance; and provided that the owner or occupant of any building who shall permit dense smoke to issue from the chimney of such building, within the corporate limits, shall be guilty of a misdemeanor, and shall be fined, etc."
>
> . . .
>
> "The emission of dense smoke from smokestacks or chimneys is not necessarily a public nuisance. Whether so or not would depend largely upon the locality and surroundings, but the ordinance makes no provision for a determination of the question upon the facts of any particular case."
>
> The ordinance was held void.

In the case of St. Louis *vs.* Hertzberg the court stated the ordinance as follows:

> "That ordinance provides that 'the emission into the open air of dense black or thick gray smoke within the corporate limits of the city of St. Louis' is hereby declared to be a nuisance, 'and the owners, occupants, managers, or agents of any establishment, locomotives, or premises from which dense black or thick gray smoke is emitted or discharged are made guilty of a misdemeanor and subject to a

> fine of not less than ten or more than fifty dollars. And each and every day wherein such smoke shall be emitted shall constitute a separate defense.'"

By its charter, the city of St. Louis was authorized "to declare, prevent, and abate nuisances on public or private property, and the causes thereof" (p. 383).

While the court remarks that the charter does not expressly give the city power to declare smoke a nuisance, and remarks that—

> "notwithstanding the broad terms in which the power is given, it is not competent for the city to declare that a nuisance which is not so in fact"—

the argument of the court against the power to declare smoke a nuisance in the terms that the ordinance did, applies as well to the power of the State as of the city, as is shown by the following quotation:

> "This court, in River Rendering Company *vs.* Behr, 77 Mo. 91, announced a safe and conservative rule on this subject. Said the court: 'We do not deny that the general assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power can not be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not.' . . .
>
> "No one, we suppose, will doubt that dense smoke may be emitted in such quantities as to become an intolerable nuisance, both to the public and individuals, but the question before us is the power of the city under its charter to declare every emission of black dense smoke or thick gray smoke a nuisance, irrespective of the length of time it is emitted, or whether it is in fact a nuisance, without providing for an inquiry as to these facts. In a word, is such an ordinance not so unreasonable that the courts should declare it void for that reason? Now, it was admitted at the bar of this court by the learned

special counsel who argued the case for the city, that the emission of 'dense black' or 'thick gray' smoke for one or two minutes constitutes an offense under this ordinance, and yet he admitted that up to this time no device or means was known or had been invented whereby such smoke could under all circumstances be suppressed or prevented; that in the first starting of a fire, before the coal or wood was thoroughly ignited, dense smoke would necessarily be emitted, but he avoided this objection to the ordinance by claiming that the inspectors employed to detect violations of the ordinance exercise a wise discretion in such cases, and do not attempt to prosecute every emission of 'dense black' or 'thick gray' smoke.

"Now the ordinance itself would punish every housekeeper who kindled a fire to cook his or her morning meal, or to warm the house. Every replenishing of the furnace, whether in the heart of the business centers or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception whatever is made as to time or quantity. When it is considered, and it must be by this court, that St. Louis has attained its growth in population and wealth in a large degree from the fact of its proximity to the great mines of bituminous coal which lie at its very door, and that this fuel has enabled it to become a great manufacturing city, and that this soft coal is peculiarly liable to produce this objectionable dense smoke, it seems to us that this ordinance, which makes no reasonable allowance for the regulation of this smoke, but essays, in advance of any known device for preventing it, to punish all who produce it to any degree whatever is wholly unreasonable. On the other hand, if, as learned counsel suggests, the ordinance is not enforced in all its strictness, but much is left to the discretion of the inspectors, then we have an unregulated official discretion which of itself renders the ordinance void, for it can not be tolerated that the rights of a citizen in this State shall depend entirely upon the caprice of any official, high or low.

> All valid ordinances must fix the duty or liability of the citizen by certain intelligible prescribed rules, so that he may govern himself accordingly.
>
> "Our conclusion is, that, while it is entirely competent for the city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health, or annoying to the public at large, this ordinance must be held void because it exceeds the powers of the city under its charter to declare and abate nuisances, and is wholly unreasonable."

This reasoning places the invalidity of the ordinance upon its unreasonableness, rather than upon want of delegated power in the municipality.

In the case of State *vs.* Mott, the ordinance of the city of Baltimore prohibited kilns from burning oyster shells or stone lime within the city limits. The grant of power to the city by the State was as follows:

> To "have power to pass ordinances to preserve the health of the city, to prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same, and may regulate the places for manufacturing soap and candles, the erecting of slaughter-houses and distilleries, and where every other offensive trade is carried on."

After stating that this grant of power was not broad enough to justify the ordinance, the court said:

> "Now it is well known and understood that the burning of lime is not an unlawful business or trade, and is not a nuisance in its nature, *per se*, irrespective of the location. On the contrary, it is one of the multitude of most useful and necessary processes for the benefit of society and for its material improvement, but which may, from mere local conditions, become nuisances (p. 306).
>
> . . . . . .
>
> "But the provision in the charter only confers authority 'to prevent and remove nuisances,' and the

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mere possibility that all the lime kilns within the limits of the city may, in the future, become nuisances, does not justify the city in prohibiting the business entirely in anticipation" (page 307).

. . . . . .

"Whether a particular lime kiln is a nuisance or not is a mixed question of law and of fact; and an indictment for maintaining such kiln as a nuisance should charge the facts necessary to bring it within the definition of a nuisance, or, at least, within the power conferred by the statute to suppress it. Here the power conferred by the statute, and attempted to be executed by the general prohibitory ordinance, can not be taken to authorize the extra judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not or may not be such. 1 Dillon on Mun. Corp. (3d ed.), sec. 374, and the cases there cited; Wood's Law of Nuisances, sec. 740" (page 307).

The court nowhere intimates that the legislature might have made a valid enactment to like effect, but the contrary is inferable from the opinion and the authorities cited in support of it.

It will be noticed that the reasons given by the courts for holding invalid the ordinances mentioned in the three cases last cited were that they were unreasonable and in restraint of private right. Would they have been less so if they had been enacted by the legislatures?

It must be apparent, as was offered to be proved in the case, that it would be utterly impossible to operate a plant like the one described in the evidence in this case, with any kind of fuel or with any sort of appliances, without at times emitting for a few minutes the condemned smoke, and, if such is the proper construction of the statute, then it is undoubtedly void, as it would deprive many persons and corporations within the District of Columbia of the use of their property.

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